DEC 22 19
MICHAEL RODAK,

No. 80-332

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

JAMES A. RHODES, et al.,

Petitioners,

vs.

KELLY CHAPMAN, et al.,

Respondents

On Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF OF PETITIONERS

WILLIAM J. BROWN
Attorney General

ALLEN P. ADLER
COUNSEL OF RECORD

LEO J. CONWAY
Assistant Attorneys General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414

COUNSEL FOR PETITIONERS

QUESTION PRESENTED

WHETHER THE DOUBLE CELLING OF PRISON INMATES CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT WHERE THE RECORD INDICATES THAT THE PRACTICE DOES NOT DEPRIVE INMATES OF MINIMUM CONSTITUTIONAL GUARANTEES TO ADEQUATE FOOD, CLOTHING, SHELTER, SANITATION, MEDICAL CARE AND PERSONAL SAFETY.

PARTIES

The petitioners in this action are James A. Rhodes, Governor of the State of Ohio, George F. Denton, Director of the Department of Rehabilitation and Correction, and Ronald G. Marshall, Superintendent of the Southern Ohio Correctional Facility, as the successor to Arnold R. Jago, a named defendant in the courts below. The respondents are Kelly Chapman and Richard Jaworski, the named plaintiffs in the courts below for a class of all inmates at the Southern Ohio Correctional Facility.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is unreported. (P. A. 2). The decision of the United States District Court for the Southern District of Ohio, Western Division is reported as *Chapman v. Rhodes*, 434 F. Supp. 1007 (S.D. Ohio 1977). (P. A. 4).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered June 6, 1980. Jurisdiction is conferred by 28 U.S.C. Section 1254(1). The petition for a writ of certiorari was filed on September 2, 1980. Certiorari was granted November 3, 1980.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment VIII to the Constitution of the United States prohibiting cruel and unusual punishment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

made applicable to the states by Section 1 and 5 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

and enforced by Title 42, Section 1983, United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On July 10, 1975, Kelly Chapman and Richard Jaworski, inmates incarcerated at the Southern Ohio Correctional Facility (hereinafter "SOCF"), filed a petition under 42 U.S.C. §1983 attacking their conditions of confinement by seeking injunctive relief and damages. Following the appearance of counsel for all parties, the case was allowed to proceed as a class action. The class was made up of all 2300 inmates at SOCF.

The Southern Ohio Correctional Facility is Ohio's only maximum security penitentiary and was built in the early 1970's at a cost of thirty-two million dollars. (P.A. 9)[1] The institution is located on a huge rural tract of land and consists of several contiguous buildings occupying more than twenty (20) acres under a single roof. (P.A. 9; Plaintiffs' Exhibit 34). SOCF contains 1620 cells, two 10-bed hospital wards, and twenty (20) hospital cells (P.A. 10, 13). The institution was designed at a time when prison populations throughout the country were on the decline. (P.A. 10). At the time of trial the trend had reversed. The population at SOCF had risen by thirty-eight percent (38%) from 1972 to 1977 (P.A. 13).

The institution is made up of three major units; K-Complex, L-Complex, and J-Complex. K-Complex and L-Complex each contain eight (8) cell blocks intersecting the central corridor, with a gymnasium at one end and access to the rest of the facility at the other end. Each cell block has an upper and lower range or tier. Each range has a shower located close to the guard console. J-Complex is a more secure version of K and L-Complexes and contains only four (4) cell blocks and the central corridor. J-Complex housed death row inmates and those in long-term administrative isolation. The cell ranges are similar to K and L, with the exception of J-1 Block which contains twenty (20) cells.

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[1]Citations to the appendix to the petition for a writ of certiorari will be abbreviated P.A.

The complexes share common support facilities, including a well-stocked library, holding 25,000 volumes and modern school facilities. In addition, the institution contains two chapels, a commissary, barbershop, kitchen, two (2) dining halls and an industrial area which includes the prison laundry, a machine shop, a shoe factory, a sheet metal shop, print shop, sign shop, and a small engine repair shop. At the entrance to the institution are the administrative offices, a large visiting room, the infirmary, and the housing for inmates on merit status, D-Block. There is an adequate recreation field and an outdoor visitation area with a children's playground.

The cells used by the general population of SOCF are of two types. There are 660 inside cells, having three solid walls and a barred entrance. Inside cells measure six feet by ten feet six inches, or sixty-three (63) square feet, and are nine (9) feet high. There are 960 outside cells, each measures six feet six inches by ten feet six inches, or sixty-eight and one quarter (68.25) square feet, and are nine (9) feet high. Outside cells are built along the outside wall of the block and have a window (P.A. 13, 14).

The inside cells are located in the merit Block D-2, Blocks J-1 through J-4 and Blocks K-1 through K-4. At the time of trial, approximately 1400 men were double-celled. All cells in K-2 and K-3, most of the cells in K-4 and some of the cells in J-4 were doubled. Cell blocks D-2 (merit), K-1 (protective custody), J-1 (super max), J-2 (disciplinary isolation) and J-3 (death row) were single-celled. Of the inside cells, approximately 350 were single-celled. (P.A. 13). More than half of the 960 outside cells, located in Blocks K-5 through K-8 and L-1 through L-8, were double-celled. All cells were suitably furnished and had hot and cold running water. Double-celling was accomplished by adding a top bunk (P.A. 14).

Upon arrival at SOCF, all inmates were housed in K-5 Block for about two weeks. After being classified, an inmate

was assigned to another block. Cell blocks K-6 through K-8 housed inmates with trade or vocational assignments. Cell blocks L-1 through L-8 housed inmates attending school or holding jobs. Blocks K-3 and K-4 held prisoners classified as "voluntarily idle." K-2 Block was classified as "limited activity" and housed those who had requested protective custody but could not substantiate their needs (P.A. 16).

An individual's classification and cell assignment determined the amount of time he was allowed out of his cell. Inmates living in Blocks D-2, K-6 through K-8 and L-1 through L-8, the majority of those double-celled, were free to be out of their cells from 6:30 a.m. to 9:30 p.m. During the day, these inmates were at meals, at recreation, in the library, working, attending school, seeing visitors, showering, or in the various dayrooms. These men, along with inmates housed in Blocks K-3 and K-4, visited the commissary once a week and were allowed a weekly movie. These inmates were also able to attend weekly religious services (P.A. 15-17).

Men housed in Blocks K-3, K-4 and K-5 were permitted two to four hours out-of-cell exercise per week, ate in the dining hall and visited in the visiting room. Similarly, inmates in K-2 and J-4 had limited out-of-cell activity (P.A. 17-18). As noted above, all other inmates, those in tight security and locked in most of the time, were single-celled.

Approximately seventy-five percent (75%) of the double-celled inmates were permitted out of their cells most of the day (P.A. 18). For those confined in double-cells most of the day, the time limitation was a direct result of their classification. They had either requested their classification or were classified to an idle or isolation block because of past discipline or behavior problems.

Following the filing of a second amended complaint, which contained no prayer for damages (J.A. 14), the case proceeded to trial on May 23, 1977, and was concluded on May 27, 1977.

The district court found that the class of SOCF inmates alleged they had been subjected to cruel and unusual punishment in violation of the Eighth Amendment, in that:

1. Violence and terror to an impermissible degree resulted from the practice of placing two inmates in the same cell.
2. The number of guards and employees providing services to the inmate population was inadequate to serve the population, and the shortage of personnel had fostered violence and a lawless atmosphere;
3. The inmates were not properly fed because food services were overtaxed;
4. Overcrowding had limited access to the courts;
5. Heating and ventilation systems were not adequate;
6. Medical services were overtaxed; and
7. Inmate job opportunities and access to educational programs had been denied, thereby affecting the rehabilitation process (P.A. 8-9).

The district court concluded that SOCF was a first-class facility (P.A. 9). Food was adequate both in quality and quantity (P.A. 18-20). Ventilation was adequate (P.A. 20). The incidents of violence were within normal limits for a prison (P.A. 21, 29). Visiting privileges were good, if not exceptional (P.A. 20). The ratio of inmates to guards was well within acceptable standards (P.A. 21). Plumbing and lighting were completely adequate (P.A. 21). There had been some assignment of extra men to existing jobs, but this "watering down" of jobs made more jobs available. (P.A. 22-23). No complaint was made about classroom and library facilities. There was no evidence that any inmate was denied an opportunity for education, but it was found that some had their educations delayed (P.A. 23) The law library was adequate (P.A. 21). No credible evidence was presented to

the district court to demonstrate any constitutional inadequacy in the area of medical services (P.A. 24-25). Any deficiency in dental services was due not to the double-celling of inmates or the increased population, but rather to the lack of a dentist (P.A. 34). It was also found that the number of psychologists and social workers had not increased along with the inmate population (P.A. 26).

The alleged increase in violence brought about by double-celling, described as a geometric increase (R.474) was found to be non-existent (P.A. 33). The increase in violent incidents appeared to the district court to be on a one-to-one ratio with the increase in population and not due to the double-celling of inmates (P.A. 24).

The district court found that the increase in population at SOCF was directly related to the increase in crime in both the nation and the state (P.A. 10). It was not alleged by the respondents or found by the trial court that the double-celling of inmates at SOCF has been the result of any arbitrary or capricious exercise of judgment on the part of the petitioners or imposed as a means of punishment. Rather, the increase in population was clearly due to a state-wide increase in the number of prison commitments by the sentencing courts (P.A. 13).

SOCF is the only maximum security correctional facility operated by the State of Ohio (P.A. 9). The inmates at SOCF are there because they have been classified as maximum security prisoners. The district court reviewed the classification regulations and found them adequate (P.A. 15). No evidence was presented to the court below that would sustain a finding that the population to cell ratio at SOCF was out of proportion to that of other correctional facilities in Ohio.

On June 29, 1977, and by amendment on July 1, 1977, the district court filed its findings of fact and conclusions of law in which it concluded "on balance" that double-celling at SOCF was unconstitutional (P.A. 34, 38) and directed

petitioners to formulate, propose, and carry out a plan to eliminate double-celling at SOCF. On October 4, 1977, petitioners were allowed an extension for filing the proposed plan until November 14, 1977. Petitioners filed a petition for leave to file an interlocutory appeal which was granted by the district court and later denied by the court of appeals.

On February 16, 1978, the case was assigned for an evidentiary hearing on the plans proposed by petitioners, respondents' objections thereto, and respondents' request for an incremental reduction order. The matter was heard on March 7, 1978. At that time petitioners orally asked for a reconsideration of the court's earlier conclusions of law (R. 1240).

In its memorandum of March 21, 1978 (P.A. 39), followed by the judgment entered on April 7, 1978 (P.A. 42), the district court adopted its prior findings of fact and ordered the petitioners to reduce the population at SOCF from the assigned population of March 21, 1978, by twenty-five (25) persons on or before April 30, 1978, and to continue the reduction at the rate of twenty-five (25) persons every thirty (30) days until the single cell capacity of the institution was reached. On August 25, 1978, the judgment was slightly modified to permit the assignment of 1,645 inmates at SOCF (J.A. 38).

A notice of appeal was filed on May 1, 1978. On July 20, 1978, a motion for stay of execution and expedited hearing was denied by the United States Court of Appeals for the Sixth Circuit. Following this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979), the district court, on August 14, 1979, denied petitioners' motion for relief from judgment and stay of execution of judgment (J.A. 40). Thereafter, on November 8, 1979, the court of appeals denied a motion for advancement for hearing, summary reversal and stay of execution by a 2-1 vote (J.A. 44). Following briefing and oral argument on June 2, 1980, the court of appeals affirmed the decision of the district court without opinion on June 6, 1980 (P.A. 2).

On September 2, 1980, a petition for a writ of certiorari was filed with this Court. Following answer by the respondents, the petition was granted on November 3, 1980.

SUMMARY OF ARGUMENT

The district court found that conditions at the Southern Ohio Correctional Facility were unconstitutional. The finding was based on the conclusion that the institution was double-celled; that inmates were not fully employed; that some inmates experienced delays in their educations; and that the number of social workers and psychologists had not increased with the number of inmates assigned to SOCF. These conclusions were reached after the court had decided that the remainder of the respondents many allegations were without merit and in spite of the fact that the court had previously ruled that inmates had no right to privacy, jobs, education or rehabilitation.

None of the conditions found by the district court deprived the respondents of the necessities of life: adequate food, clothing, shelter, sanitation, medical care and personal safety. The inmates were only subjected to minor inconveniences and discomforts by the conditions. The lower courts, therefore, erred in finding that the conditions at SOCF were unconstitutional.

Guidelines should be established within which administrators will be able to control the nation's prisons. These same guidelines are necessary better to define judicial review of prison conditions and to prevent prisoners from litigating any and every combination of minor complaints as constitutional questions.

ARGUMENT

I. THE FINDING

In their second amended complaint (J.A. 14), respondents alleged that they were subjected to cruel and unusual punishment because SOCF was overcrowded in that:

1. The cells at SOCF were designed for single occupancy.
2. Fifty percent (50%) of the prisoners at SOCF were confined in two-man cells.
3. Many prisoners had requested isolated confinement to escape physical and emotional abuse.
4. Respondents Chapman and Jaworski were confined in a two-man cell.
5. The cells measure ten feet six inches by six feet six inches; there was not room for two men to stand in a cell at the same time.
6. The cell blocks were humid and stuffy, smelled and were intolerable and unbearable.
7. Prisoners had no privacy.
8. Day rooms were crowded.
9. Prisoners had to wait to drink water or urinate.
10. Institutional services were barely adequate before the population increased.
11. Medical, dental, psychiatric and social work services were grossly inadequate after the population increase.
12. The available resources were totally inadequate to meet the educational, vocational and counseling needs of the inmates.
13. Work assignments were extremely limited; a substantial percentage of the prisoners lived in forced idleness almost exclusively within the confines of their cells and cell block areas.

14. Extraordinary overcrowding and the lack of meaningful opportunities served to dehabilitate inmates.
15. Treatment and rehabilitation programs were allocated irrationally, capriciously and arbitrarily.
16. Classes of inmates had developed according to their access to opportunities and resources.
17. The conditions at SOCF resulted in episodes of disruptive and anti-social behavior.
18. The guards were unable and unwilling to protect the inmates.
19. A lawless atmosphere existed in the institution.
20. As a result of overcrowding, prisoners were unreasonably and arbitrarily denied parole.
21. The quantity and quality of food was grossly inadequate.
22. Prisoners' access to the law library was restricted; pending litigation was delayed.
23. Visitation facilities were overcrowded.
24. Inadequate training of guards had resulted in the use of unwarranted force, intimidation, and racist procedures and policies.
25. All the prisoners at SOCF suffered as a result of double-celling.

The district court rejected virtually all of respondents' allegations and only found objectionable the practice of double-celling; the watering down of jobs; the delay in education; and the fact that the number of social workers and psychologists had not increased with the population.[2] (P.A. 26).

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[2]It should be noted that while the district court speaks of a social worker and a psychologist, the institution employed six social workers, three psychologists and a part-time psychiatrist. (Plaintiff's Exhibit 12).

Once the district court's decision is stripped of the false premise that any and every conceivable combination of less than desirable conditions is unconstitutional, one issue remains. Does double-celling amount to cruel and unusual punishment? Examination of the record in this case shows an *ad hoc* determination that placing two men in one cell is unconstitutional. The decision in question, if allowed to stand as a precedent, would practically eliminate double-celling at every correctional institution in the country.

Regardless of the circumstances or a prisoner's classification, the district court found all double-celling to be unconstitutional. The court based its conclusion on the following reasons: 1) the inmates are "long-term"; 2) the inmate population, due to double-celling, was greater than design capacity; 3) the average floor space available to each inmate in a double-cell, approximately thirty (30) to thirty-five (35) square feet, was below the standards set by various organizations; 4) double-celled inmates spend most of their time in their cells; and 5) the practice of double-celling was of long-term duration.

These premises are all either necessary and self-evident concomitants of double-celling or they are rather unremarkable indications that inmates are incarcerated for the commission of serious offenses. They are not, in any reasonable sense, factors distinct from double-celling to be considered in analyzing the totality of the circumstances.

A finding that double-celling is unconstitutional, based upon the reasons for the practice and its natural consequences; is a finding that double-celling is *per se* unconstitutional.

II. THE CONSTITUTIONAL STANDARD

This case presents an important issue of constitutional law not specifically addressed by this court - whether the double-celling of convicted maximum security inmates constitutes

cruel and unusual punishment where such practice does not deprive such inmates of the basic necessities of life. It is the petitioners' position that the best test for measuring the constitutionality of a correctional institution is that articulated in *Newman v. State of Alabama,* 559 F. 2d 283 (5th Cir. 1977), *cert. den.,* 438 U.S. 915 (1978);

> If the State furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety, so as to avoid the imposition of cruel and unusual punishment, that ends its obligations under Amendment Eight. The Constitution does not require that prisoners, as individuals or as a group, be provided with any and every amenity which some person may think is needed to avoid mental, physical, and emotional deterioration. *Newman,* at 291.

The same standard was applied in *Wolfish v. Levi,* 573 F. 2d 118, 125 (2nd Cir. 1978);

> ...An institution's obligation under the eighth amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care and personal safety.

The standard was noted by this Court in its review of that decision. *Bell v. Wolfish,* 441 U.S. 520 at 529 n. 11 (1979).

The district court's finding that double-celling at SOCF was unconstitutional is contrary to this Court's holding in *Bell v. Wolfish, supra,* where Mr. Justice Rehnquist, writing for the majority, stated at 542:

> We disagree with both the District Court and the Court of Appeals that there is some sort of "one man, one cell" principle lurking in the due process clause of the Fifth Amendment.

That holding is the central premise of petitioners' position and is equally applicable to a case presenting an Eighth Amendment issue. To be sure, this Court's decision in *Bell* related to pre-trial detainees and turned on the question of whether or not the practice amounted to punishment. It would be incongruous however, that conditions which were not "punishment" for presumably innocent defendants blossom into cruel and unusual punishment for convicted maximum security prisoners. That which is a lawful limitation on the freedom of pre-trial detainees should also be lawful as to convicted felons.

Citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), this court in *Bell* stated the criteria necessary to establish that a practice is punishment:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. *Bell*, at 537-538.

Double-bunking of prison inmates is established both historically and in other prison systems and the practice has its analogies in the military, schools, colleges, and the home. Moreover, the practice of double-celling at SOCF was instituted solely because of an increase in the number of people sentenced to prison requiring confinement in a

maximum security setting. No inmate at SOCF was double-celled as further punishment for his crime or as punishment for violation of an institutional rule. No expressed intent to punish was alleged by the respondents, nor was it alleged that the decision to double-cell any individual was arbitrary or purposeless. Ohio prison administrators were simply charged with the custody of more than 1620 maximum security prisoners and had no other adequate facilities in which to house them. The fact that such a practice may be less than ideal in no way converts the practice into cruel and unusual punishment. Not every disability or discomfort constitutes punishment. *Bell, supra,* at 540.

Petitioners interpret this Court's statement in *Bell* that confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardships over an extended period of time might raise serious due process questions to mean that an affirmative showing of deprivation of constitutionality mandated rights must be made. No such finding was made in this case.

Although this Court has decided several cases involving the concept of cruel and unusual punishment in the context of sentencing, little has been specifically decided in the context of prison conditions.[3] In *Estelle v. Gamble,* 429 U.S. 97 (1976), this Court decided that deliberate indifference to a serious medical need was cruel and unusual punishment. Similarly, in *Hutto v. Finney,* 437 U.S. 678 (1978), this Court ratified the relief ordered in dealing with isolation cells. By all accounts, SOCF is a modern institution built with support facilities able to handle a population well in excess of 1645.

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[3]This court had dealt with many prison cases. *Jones v. North Carolina Prisoners' Labor Union,* 433 U.S. 119 (1977); *Bounds v. Smith,* 430 U.S. 817 (1977); *Meachum v. Fano,* 427 U.S. 215 (1976); *Wolff v. McDonnell,* 418 U.S. 539 (1974); *Pell v. Procunier,* 417 U.S. 817 (1974); *Procunier v. Martinez,* 416 U.S. 396 (1974). These decisions involved questions of First Amendment or procedural due process rights of prisoners related to various institutional practices.

SOCF is not, and was not, "a dark and evil world completely alien to the free world", *Hutto v. Finney, supra,* at 681, nor was it the unsanitary, vermin infested, ancient, deteriorating dungeon pictured in most prison cases decided by other courts.

The decisions of the courts below are in direct conflict with all other circuits which have addressed the issue. At least four other circuits have found the double-celling of convicted prison inmates to be constitutionally permissible. *Newman v. Alabama, supra; Wolfish v. Levi, supra; Detainees of Brooklyn H. of Det. for Men v. Malcolm,* 520 F. 2d 392 (2nd Cir. 1975); *Crowe v. Leeke,* 540 F. 2d 740 (4th Cir. 1976); *Hite v. Leeke,* 564 F. 2d 670 (4th Cir. 1977); *Burks v. Walsh,* 461 F. Supp. 454 (W.D. Mo. 1978), *aff'd sub nom., Burks v. Teasdale,* 603 F. 2d 59 (8th Cir. 1979).

In *Crowe v. Leeke, supra,* it was held that confining three protective custody inmates, men confined all but a few hours a week, in sixty-three (63) square foot cells with only two beds did not amount to cruel and unusual punishment. The court recognized that the number of inmates assigned to a cell is a matter best left to the sound discretion of prison administrators, i.e., those in the best position to balance prisoners' rights against the state's responsibility for security and order.

Similarly, in *Burks v. Teasdale, supra,* a decision allowing the practice of double-celling was affirmed. A comparison to this case is important. The district court in *Burks v. Walsh, supra,* at 485-487, has found that sanitation was somewhat lacking in shower areas, that food service areas were only reasonably clean, that improvements were needed in the area of pest control, that the institution was old and sometimes noisy, that temperatures were uncomfortable due to an antiquated ventilation system, that broken windows were repaired only on an annual basis, that the dining room was not too crowded, that excessive idleness and tension were evident, and that additional supervisory personnel were

needed. Yet even with these deficiencies, conditions absent in this case, double-celling on a twenty-four hour per day basis, of administrative isolation inmates, for periods of up to four years, was permitted.

In *Hite v. Leeke, supra,* it was held that double-celling alone failed to state a claim for relief under 42 U.S.C. §1983. This decision is of particular importance because the cells are similar to the cells at SOCF, the institution involved was approximately the same age as SOCF and the inmates were permitted slightly less time outside their cells. That court held at 673-674:

> ...This means that the only claim on which plaintiffs can assert a right to relief turns on whether double occupancy of the prison cells constitutes cruel and unusual punishment.
>
> The plaintiffs contend that the dual assignment of two prisoners to a room sixty-five feet square in this prison is *per se* unconstitutional. As we have already pointed out, this assignment to cells is only at night between the hours of 8 p.m. and 6 a.m.; at all other times, the prisoners enjoy a wide freedom of movement and ample opportunity for exercise and recreation. Nor is overcrowding a part of a larger problem of unsanitary conditions or of a pervasive air of physical danger, giving rise to what has been described as the "totality of conditions approach" in this context. *See, ibid.* 12 *Harv. Civ. Rights -Civ. Liberties L. Rev.* at 372; *Costeilo v. Wainwright* (M.D. Fla. 1975), 397 F. Supp. 20, 32, *aff'd* 525 F. 2d 1239, *rehearing en banc granted* 5 Cir., 528 F. 2d 1381, *rev. and remanded on other grounds,* 5 Cir., 539 F. 2d 547 (1976); and *Pugh v. Locke, supra.* The plaintiffs conceded during oral argument that they knew of no case, and neither do we, that holds dual assignment of prison inmates

> alone to constitute "cruel and unusual punishment." They do cite certain cases from the Second Circuit that, because of their special circumstances, it was found to be a violation of constitutional rights to confine two pretrial detainees in a single cell. *Ambrose v. Malcolm*, (S.D. N.Y. 1976), 414 F. Supp. 485; *Detainees of Brooklyn H. of Det. for Men v. Malcolm*, (2d Cir. 1975), 520 F. 2d 392. In the latter case, however, the Court was careful to emphasize that its ruling was strictly confined to pretrial detainees and was without application to convicted prisoners.

and at 674-675:

> So far as convicted prisoners are concerned, we have recently held specifically that the assignment of three prison inmates to a cell about the size of those with which we are concerned did not amount to "cruel and unusual punishment." *Crowe v. Leeke* (4th Cir. 1976), 540 F. 2d 740. The Court in that case emphasized that there was no contention there, just as there is not here, that the prisoners had been "subjected to mental abuse or corporal punishment;* * deprived of the basic implements of personal hygiene; * * * [or] that his cell failed to meet reasonable sanitary standards." The petitioner's complaint-similar to that here - was simply that the assignment of three prisoners, confined in maximum security, to a cell was *per se* unconstitutional. Finding that there was no indication "that the overcrowding has resulted from an 'arbitrary or capricious' exercise of judgment by prison officials," the number of inmates, who may be safely assigned to a cell is a matter resting within the sound discretion of the

> prison administration, and the claim of cruel and unusual punishment was dismissed. Similarly in this case, it is clear that the defendants have not acted arbitrarily or capriciously in their assignments of inmates nor have they, in their dual assignments, been "the cause of deplorable or inhumane conditions." The decision in *Crowe* would appear conclusive on the issue of dual assignment of inmates in this case. (Footnotes omitted.)

The same court has also found an institution unconstitutionally overcrowded where the conditions created deprivations and disadvantages to the inmate population. In *Johnson v. Levine,* 588 F. 2d 1378 (4th Cir. 1978), the court dealt with a breakdown in the maintenance of sanitation, a high level of violence, overtaxed medical facilities and staff, an overburdened food service as well as double-celling and limited opportunities for recreation and instruction.

In the above cited decisions, the courts have taken the position, advanced by petitioners, that the right to relief turns not on the practice of double-celling itself but whether that practice is part of a larger problem of unsanitary conditions, violence, or lack of food, clothing, shelter and medical care; those things that are the basic necessities of life.

As previously indicated, the district court found a watering down of jobs, a delay in education, and a less than desirable level of psychological and social work staff. What the district court did not find was that these deficiencies presented a threat to the lives and health of the inmates. The Constitution simply does not guarantee full employment, immediate education, or rehabilitative services. In fact, the district court reached that exact conclusion in an earlier decision in this case:

Plaintiffs' sixth cause of action is that the defendants, by selecting a limited number of individual inmates to participate in the work, vocational, educational and other opportunities and programs, have violated the equal protection clause of the fourteenth amendment of the United States Constitution.

The problem, of course, with plaintiffs' contention is that a prisoner has no constitutional right to work or be educated while in prison. *Cradle v. Superintendent,* 370 F. Supp. 79 (W.D. Va. 1974). The plaintiffs' contention, in essence, is that if a state undertakes to provide any rehabilitative services, it must provide such services to all inmates. However, as there are no constitutional duties imposed on any governmental entity to educate or rehabilitate a prisoner, this Court believes that efforts to rehabilitate and educate are to be commended and that requiring every prisoner to be treated exactly alike might discourage rather than encourage such programs. *McLamore v. State,* 257 S.C. 413, 186 S.E. 2d 250 (1972). This Court believes that a constitutional issue is raised only if an inmate's work assignment is decided arbitrarily or capriciously. *Beatham v. Manson,* 367 F. Supp. 783 (D. Conn. 1973). Such an allegation is not present in this record.

Plaintiffs claim in their seventh and ninth causes of action that the defendants have failed to provide them with a reasonable opportunity for rehabilitation and that the present conditions at the Southern Ohio Correctional Facility are such as to increase the likelihood that they will not be rehabilitated or successfully integrated into society in violation of the cruel and unusual punishment provisions of the eighth amendment and due

> process provision of the fourteenth amendment. While rehabilitation is certainly an important goal of an institution of confinement, thisCourt has been unable to find a single case holding that there is a general constitutional right to rehabilitation. (J.A. 11).

In ultimately abandoning its above quoted earlier decision, the district court focused on current standards promulgated by professional organizations respecting the desired size of prison cells and institutions (P.A. 36). This Court in *Bell,* however, held that constitutional rights are not coextensive with or determined by such constantly changing, increasing and somewhat utopian standards. *Bell, supra,* at 543, n. 27. Prison administrators are limited by the reality of budgetary constraints and already existing physical facilities. *Bell* simply indicates that the Constitution forbids the deprivation of the basic necessities of life and health. While the district court found a watering down of jobs, a delay in education and less than desirable access to psychologists and social workers, such "rights" are not of the dimension basic to sustain life. In reaching its decision, the appellate court misapplied *Bell* and failed to heed the admonition of this court in *Procunier v. Martinez,* 416 U.S. 396 (1974), that prison administration is best left to prison administrators:

> ... courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. *Procunier,* at 405.

III. RELIEF ORDERED

Petitioners are not seeking a reversal on the separate question of whether or not the relief ordered by the district court was appropriate to the circumstances. Instead, petitioners have challenged the finding of liability itself. The relief ordered, however, underscores that the finding of

liability is based on what is desirable and not on what is constitutionally required. For example, if the number of social workers and psychologists was inadequate, or if work and educational opportunities were deficient, the court could have ordered remedial measures in those areas. Moreover, if the amount of time inmates were allowed out of their cells was inadequate, the district court could have ordered an increase. Instead, without making any differentiation as to which inmates were being double-celled and under what circumstances, the district court simply ordered the elimination of the practice. In doing so, the district court focused solely on the number of men housed in the institution compared to the number it decided the institution was designed to house.

If the court had adopted petitioners' first compliance plan (J.A. 28), those inmates confined in their cells for most of the time would have been single-celled; and those inmates free to move about the institution for fifteen (15) hours each day would have remained double-celled. The district court was aware that this plan had been implemented at the time the final judgment was entered (P.A. 40; R. 1150, 1229, 1235). Instead, the district court chose a remedy that effectively destroyed a classification system it had apparently found to be adequate (P.A. 15) and in the final analysis, the court's remedy also failed to end double-celling at SOCF.

IV. CONCLUSION

In the last decade, prison litigation has flourished, resulting in a variety of conflicting decisions as to what is necessary to provide prisoners with minimum constitutional standards. In an era of increasing numbers of people being committed to correctional systems with limited resources, the area of greatest concern is the ability of the systems to adequately house the growing number of inmates. Petitioners seek a clear statement from this Court defining the parameters in which prison officials may utilize existing facilities to fulfill their responsibilities.

The result reached in the courts below, limiting prison population to original design capacity, regardless of the fact that inmates were not denied any of the necessities of life will have a wide-ranging impact on all corrections systems. To set firm guidelines for future decision making, this Court should distinguish that which is constitutionally required from that which may be deemed desirable by prison reformers or by prison administrators themselves. The Eighth Amendment prohibition against cruel and unusual punishment was not intended to remove all control from prison officials in the day to day operation of their institutions. Here the petitioners provided the inmates under their care with all the things necessary to maintain health and safety.

Allowing the decision of the courts below to stand is tantamount to establishing perfection as the minimum standard of constitutionality. The district court and the court of appeals have held that double-celling, coupled with minor inconveniences and discomforts in areas having nothing to do with the health and safety of the inmates is unconstitutional. No finding was made by either court that the inconveniences and discomforts, by themselves or in combination, were barbarous and shocking. If this decision is allowed to stand, allegations of any and every conceivable combination of prisoner complaints will be raised to the level of constitutional questions.

The decision of the court below should be reversed.

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief Of Petitioners have been served on respondents, Kelly Chapman, #122-531, P.O. Box 45699, Lucasville, Ohio, 45699 and Richard Jaworski, #734304, River Junction Correctional Institution, P.O. Box 37, Chattahoochee, Florida, 32324 by forwarding such copies through the office of their counsel, Louis A. Jacobs, Ohio State University, College of Law, 1659 North High Street, Columbus, Ohio, 43210, Jean P. Kamp, Legal Aid Society of Columbus, 40 West Gay Street, Columbus, Ohio, 43215, Christopher D. Stanley, 611 Rockefeller Building, Cleveland, Ohio, 44113, and Robert K. Handelman, 186 East Eleventh Avenue, Columbus, Ohio, 43201, by United States mail, postage prepaid, this day of , 1980. I further certify that all parties required to be served have been so served.

ALLEN P. ADLER
Assistant Attorney General